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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 228

WILLIAM R. BROWN,

Petitioner,

vs.

VINCENT O'BRIEN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

The petitioner, William R. Brown, respectfully prays that a writ of certiorari may issue to review the decision of the Supreme Court of Illinois entered in the above entitled cause on March 14, 1949 which affirmed the judgment of the Superior Court of Cook County, Illinois.

I.

Statement of the Matter Involved.

Respondent, Vincent O'Brien, a lawyer since 1922, (R.18), sued petitioner, William R. Brown, in the Superior Court of Cook County to recover three times the amount of an

alleged overcharge for rent exacted by petitioner, as authorized by the Emergency Price Control Act and amendments thereto, and attorney fees. (50 U. S. C. A. App. sec. 925 (e)). (R. 1,2) After the evidence was concluded the judge directed the jury to find the petitioner had demanded and received $1,320 rent in violation of such statute. (R. 35). The Court, heard evidence and assessed the damages, entered judgment against petitioner for the amount of $3,960, and an additional amount of $500 fixed by the court as reasonable attorney fees. (R. 3, 13) The petitioner throughout the pleading and trial claimed that the Emergency Price Control Act was unconstitutional, and raised other constitutional questions.

Petitioner leased to respondent a residence property in Chicago for the term October 1, 1941, to September 30, 1943. In like manner the premises were let to respondent by a second lease for the two-year term October 1, 1943, to September 30, 1945. The provision for rent was, in both leases, identical:

> "First. Lessee shall pay to lessor, at the office of lessor, or designated agent, the rent per month of One Hundred twenty-five dollars ($125.00) in advance, for the term created by this lease."

Respondent withheld possession (R. 29) of the premises after notice from his landlord in August, 1945, that the lease would not be renewed that he was going to remove the property from the rental market. (R. 20, 21.)

He stayed in possession until May 20, 1946, tendering to defendant the sum of $125 for each month beyond the end of the term of the second lease through April, 1946. These tenders were refused. (R. 19, 20.)

On January 24, 1946 the petitioner commenced an action in the Municipal Court of Chicago against the respondent.

This action was on a covenant in the lease for the payment of liquidated damages of $10 per day for each day the respondent withheld possession of the premises from petitioner after the expiration of the lease. The Municipal Court dismissed the action and petitioner appealed. (R. 22, 23.)

On November 22, 1946 while the appeal was pending respondent wrote a letter to the petitioner in which he said:

> "You will recall that the written lease between us covering that property was for a term which expired on September 30, 1945, at a rental of $125.00 per month. That lease provides that at the termination thereof I shall yield possession of that property to you and failing so to do shall pay as liquidated damages the sum of $10.00 per day. I surrendered possession of that property to you on May 20, 1946 i.e. 232 days after the expiration of that lease. You have contended that at the time of the expiration of that lease you wished to remove that property from the rental market and at that time I was required to surrender possession of the property to you. You further contend that under the provisions of that lease I became and am liable to pay you $2320.00 being the product of $10.00 per day for the 232 days in question. I hereby tender to you $2320 in United States Currency, being as hereinbefore set forth the amount of your claim."

The payment thus tendered was accepted by petitioner (R. 20, 21).

The respondent decided to pay petitioner's claim and sue him under the statute for triple damages and attorneys fees (R. 10, 26).

The Appellate Court held that the petitioner having received the liquidated damages of $10.00 per day claimed in the appeal dismissed the appeal (R. 24). *Brown* v. *O'Brien*, 331 Ill. App. 23.

On January 10, 1947 the present action was instituted

for three times the alleged overpayment of rent of $1320.00 and for reasonable attorneys fees as provided in the Emergency Price Control Act as amended, (50 U.S.C.A. App. Sec. 925 (e).) The overcharge was calculated as being the difference between the $2320.00 paid as liquidated damages and the alleged maximum rent of $1000 for eight months October 1945 to May 1946 (R. 1, 2).

The answer of petitioner raised the defense that the act was unconstitutional as it deprived petitioner of trial by jury contrary to the Constitution of the United States and the State of Illinois; and that respondent was estopped from claiming the payment of liquidated damages for withholding possession of the premises was rent; that the maximum rent was $3000 for a two year term; that respondent was not an occupant of the premises on November 22, 1946 when the $2320 was paid (R. 2, 3). The petitioner amended his answer to allege that respondent made the payment of $2320 for the purpose of enriching himself by bringing this suit (R. 8).

The trial court directed the jury to return the following verdict:

> "We, the jury, find that the defendant William R. Brown demanded and received from Vincent O'Brien, the plaintiff, an overcharge of rent in the amount of $1320.00 in violation of the Emergency Price Control Act of 1942, as amended" (R. 35).

The trial court heard evidence and argument concerning attorneys' fees and damages and allowed $500 as attorneys' fees and assessed the damages at $3960.00 (R. 11, 12).

The State Supreme Court of Illinois in affirming the judgment held that the constitutional right of trial by jury is not impaired when the amount of damages is found by a court after a jury or a pleading has established a factual basis out of which damages arise (R. 66).

The State Supreme Court also held that Congress has the power to regulate procedure in State Courts in the enforcement of Federal Laws (R. 65).

The State Supreme Court also held that the sum of $2320 paid to the owner of the premises as liquidated damages for withholding possession of the premises was a payment of rent (R. 63, 64).

The State Supreme Court also held that The Emergency Price Control Act, and regulations thereunder were intended to "freeze" the occupancy of premises and tenants could lawfully occupy premises so long as they paid rent (R. 64).

The Supreme Court dismissed all other points urged without specific decision (R. 67). These points are discussed at length in the dissenting opinion holding that a payment made six months after surrender of the premises cannot be brought within the ambiguous phrase of the act "in connection with" the use and occupation of the premises (R. 71).

Another point dismissed without discussion in the majority opinion was petitioner's claim that payment made by respondent, a lawyer, for purpose of enriching himself by bringing suit for triple damages were not within the act. In the dissenting opinion it is said:

> "To deny recovery in this type of case does not mean that violations will go unpunished. Adequate means of enforcement are afforded to the Administrator without the necessity of converting the provision into an instrument of private aggrandizement" (R. 71).

II.

Jurisdictional Statement.

On March 24, 1949 the Supreme Court of Illinois, the highest court in the State of Illinois in which a decision could be had, filed its opinion affirming a judgment of the Superior Court of Cook County and on May 11, 1949 denied a petition for a rehearing (R. 58, 89).

This petition for writ of certiorari is presented within three months of May 11, 1949 having been filed August 10, 1949.

The jurisdiction of this court is invoked under Title 28 United States Code, and Judicial Procedure Section 1257, Paragraph 3, Public Law 773, 80th Congress, 67, effective September 1, 1948.

The validity of the Emergency Price Control Act of 1942, as amended, is drawn in question as denying the right of trial by jury in an action at common law in the state courts.

The judgment is a decision in which rights, privileges and immunities is specially set up or claimed under the Constitution of the United States, Seventh Amendment, and under Emergency Price Control Act of 1942, as amended, a Statute of the United States. The Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. App. 904 (d), 925 (e) and 942 (g) Chap. 26 Sec. 4 (d) and 205 (e) 56 Stat. 23 as amended by Sec. 108 (b) Chap. 325, 58 Stat. 640, approved June 30, 1944, and Sec. 302 (g) 56 Stat. 36.

III.

Questions Presented.

1. Whether in suits at common law the right of trial by jury preserved by the Seventh Amendment to the Constitution of the United States includes the assessments of damages by the jury?

2. Whether Congress can regulate the practice in the State Courts in suits at common law based on a Federal Statute so as to require the damages to be assessed by the Court and not by a jury?

3. Whether Congress can regulate the practice in the State Courts in suits at common law based on a Federal Statute so as to authorize the State Courts to enter judgment for an amount in excess of the verdict returned by the jury?

4. Whether the Emergency Price Control Act of 1942, as amended, gave respondent after notice by petitioner that he would not offer the premises for rent after the expiration of his lease, a right to withhold possession of the premises from petitioner?

5. Whether respondent, a lawyer, can six months after surrender of possession of the premises make a payment of liquidated damages for withholding possession of the premises after the expiration of his lease for the purpose of enriching himself by a suit at common law for treble damages and attorney fees maintain an action under the Emergency Price Control Act of 1942, as amended?

6. Whether respondent who has been notified by petitioner prior to the expiration of his lease that the premises would not be offered for rent after the end of the lease can maintain an action under the Emergency Price Control

Act of 1942, as amended, where he withheld possession of the premises from petitioner for 232 days after the expiration of the lease and six months after surrendering possession of the premises to petitioner paid petitioner $2320 as liquidated damages of $10 per day for withholding possession of the premises after the expiration of his lease?

IV.

Reasons Relied Upon for Allowance of the Writ.

1. The state court held that the constitutional right of trial by jury is not impaired when the amount of damages is found by a court after a jury or a pleading has established a factual basis out of which damages arise.

This raises a very important question of a right or privilege set up under the Seventh Amendment of the Constitution.

In *Dimick* v. *Scheidt,* 293 U. S. 474, 486, 79 L. Ed. 603, 611 this court held that the determination of liability and the assessment of damages are both questions of fact that must be submitted to the jury and not decided by the court.

The state court's construction of the right of trial by jury is in conflict with the decision of this court in *Dimick* v. *Scheidt, supra.*

2. The state court held that Congress could regulate the practice in state courts in actions at common law based on a Federal Statute so as to require the damages to be assessed by the court and not by a jury.

This is question of great importance in the preservation of the right of trial by jury secured by the Constitution not theretofore decided by this court.

The decision is not in accord with applicable decisions

of this court, holding that power, jurisdiction of state courts is governed by State Constitution and Statutes.

Test & Fleming v. *Katt*, 330 U. S. 386, 91 L. Ed. 776.

Caldarola v. *Eckert*, 332 U. S. 155, 91 L. Ed. 1968.

It is also inconsistent with Art. III Sec. 1 Federal Constitution as construed by this court in *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180.

3. The state court held that Congress could regulate the practice in the state courts in actions at common law so as to authorize the state court to enter judgment in an amount in excess of the verdict of the jury.

This is in direct conflict with the decision of this court in *Dimick* v. *Scheidt*, 293 U. S. 474, 482, 79 L. Ed. 603, that the Constitution forbids the court increase the damages awarded by the jury.

4. The state court held that respondent could lawfully withhold possession of the premises after the expiration of his lease and after notice by petitioner that he would not offer the premises for rent.

This decision denied petitioner the right to discontinue rental of the premises after the expiration of the lease. This is in clear conflict with the decision of this court in *Bowles* v. *Willingham*, 321 U. S. 503, 517, 88 L. Ed. 892, 905.

5. Respondent, a lawyer, made the payment six months after surrender of possession of the premises for the purpose of bringing this suit for treble damages and attorneys' fees.

This was a payment in the course of business, for gain or profit, and respondent could not bring an action under the statute.

The state court's decision is in conflict with decisions of the courts in sister states in the following cases:

Trapp v. *Great A. & P. Tea Co.*, 21 N. J. Misc. 205, 32 Atl. 2d 717.

Dunokin v. *S. W. Co-op Assn.*, 49 N. M. 69, 157 Pac. 2d 243.

Lightbody v. *Russell*, 45 N. Y. S. 2d, 15, 293 N. Y. 492.

and the dissenting opinion in this case (R. 71).

6. Respondent made the payment in question six months after he surrendered possession of the premises to petitioner. This payment cannot be said to have been "received in connection with the use or occupancy . . . of any housing accommodation".

The decision of the state court is in direct conflict with the provision of the statute. 50 U.S.C.A. App. 942 (g).

Wherefore, it is respectfully submitted that this petition for the writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

WILLIAM R. BROWN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion in State Courts.

Opinion in Illinois Supreme Court. *O'Brien* v. *Brown*, 403 Ill. 183 (Adv. Sheets) (R. 58, 70).

II.

A Statement of the matter involved is incorporated in the petition and will not be repeated here.

III.

A Jurisdictional Statement is incorporated in the petition and will not be repeated here.

IV.

Constitution and Statutes involved.

Amendment VII of the Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Constitutional Article III, Sec. 1:

> "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Statutes involved:

Emergency Price Control Act of 1942, Jan. 30, 1942, Ch. 26, Title I, S. 4(d), 56 Stat. 28 (50 U.S.C.A. App. 904(d)) Ch. 26 Title II, S. 205 (e) 56 Stat. 33, as amended June 30, 1944 C. 325, Title I, S. 108 (e) 58 Stat. 640 (50 U.S.C.A. 925 (e)) Ch. 26 Title III, Sec. 302 (g) 56 Stat. 36 (50 U.S.C.A. 942 (g)).

Sec. 4 (d) (50 U.S.C.A. App. 904 (d)) provides:

> "Nothing in this Act shall be construed to require any person . . . to offer any accommodations for rent."

Sec. 302(g) (50 U.S.C.A. 942 (g)) provides:

> "The term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations."

Sec. 205 (e) (50 U.S.C.A. App. 925 (e)) provides:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, *the person who buys* such commodity for use or consumption *other than in the course of trade or business* may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precau-

tions against the occurrence of the violation. For the purposes of this section *the payment* or receipt *of rent* for defense-area housing accommodations *shall be deemed the buying* or selling *of a commodity*, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. *If* any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and *the buyer* either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or *is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States* within such one year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. * * *"

V.

QUESTIONS PRESENTED.

The questions presented and reasons relied upon for the allowance of the writ, are incorporated in the petition and will not be repeated here. Each six questions and reasons will be discussed in the following argument.

Specification of Errors.

The Supreme Court of Illinois erred:

1. In holding that the right of trial by jury was not impaired by the court hearing evidence and assessing the damages.

2. In holding Congress had the power to regulate the practice in state courts in suits at common law so as to

require damages to be assessed by the court and not by a jury.

3. In holding that Congress can regulate the practice in state courts so as to authorize the state courts to enter judgment for an amount in excess of the verdict of the jury.

4. In holding that the Emergency Price Control Act, as amended, gave respondent a right to withhold possession of the premises after expiration of his lease and notice by petitioner that he would not offer the premises for rent.

5. In holding that respondent, a lawyer, can make a payment of liquidated damages for witholding possession of the premises six months after surrender of possession for the purpose of enriching himself by a suit at common law for treble damages and attorney's fees under the Emergency Price Control Act of 1942, as amended.

6. In holding that respondent could maintain suit under the Emergency Price Control Act as amended, for a payment made six months after he had surrendered possession of the premises.

ARGUMENT.

VI.

The right of trial by jury preserved by the Seventh Amendment of the Constitution secures to litigants the right to have the jury determine the question of liability and amount of the damages.

The trial court instructed the jury to return a verdict finding an overpayment of $1320 rent (R. 35), the trial judge heard evidence and argument and assessed the damages at $3960 and entered judgment for $3960 plus $500 attorney's fees (R. 11).

The State Supreme Court held that the right of trial by jury is not impaired when the amount of the damages are assessed by the trial judge after a jury has established the factual basis out of which damages arise (R. 66).

This is a very important question of construction of the Federal Constitution and if it stands trial judges may assess damages and enter judgment for more or less than the amount assessed by the jury or without submitting the question of damages to the jury.

The state court has decided this federal question of substance in a way probably not in accord with applicable decisions of this court. (Rule 38 (5) (a)).

In *Dimick* v. *Schiedt* (1935), 293 U. S. 474, 79 L. 603 action was brought in U. S. District Court for damages due to personal injuries due to negligent operation of an automobile on the public highway. The jury returned a verdict in favor of plaintiff for the sum of $500. Motion for new trial on ground verdict against the weight of the evidence and the damages were inadequate. District Court ordered a new trial unless defendant would consent to an increase of the damages to $1,500. Defendant consented. Circuit Court of Appeals reversed the trial court, holding that the conditional order violated the Seventh Amendment of the Federal Constitution in respect of the right of trial by jury. 70 F. 2d 558.

The Supreme Court said (p. 476):

> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."

The court then reviews the English cases and then said (p. 482):

"From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of decreasing damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury in actions such as that here under consideration."

The court then reviewed earlier cases of remittatur where damages were excessive. The court then said (p. 486):

485—H Note 2

"The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, *both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.* (Emphasis supplied.) Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,— and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bold addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff

to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept '*an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.*'" (Emphasis supplied.)

VII.

Congress can not regulate the practice in state courts in suits at common law based on a federal statute so as to require the damages to be assessed by the court and not by a jury.

The Statute Sec. 205 (e) (50 U.S.C.A. 925 (e)) provides:

> "In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge . . . upon which the action is based as the court in its discretion may determine or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine."

The state court held that Congress could regulate the practice in state courts and that this provision did not deny the right of trial by jury secured by the Seventh Amendment (R. 65).

This is a decision of a federal question of substance not theretofore determined by this court. (Rule 38 (5) (a)). This is an important question of constitutional law that should be determined and settled by this court.

We have shown under Point VI, *supra*, that this court held in *Dimick* v. *Scheidt*, 293 U. S. 474 that the determination of liability and assessment of damages is a question of fact for a jury under the Seventh Amendment.

The Seventh Amendment prohibits the reexamination of questions of fact by the trial judge in the following words:

> "No fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Under this provision Congress could not authorize federal courts much less state courts to hear evidence and reexamine facts in jury cases for purpose of assessing damages.

It should be remembered that Congress has never regulated the practice in federal courts prior to authorizing Rules of Civil Procedure for District Courts of the United States, the federal courts following state practice, much less has Congress prior to the approval of the Price Control Act of 1942 attempted to regulate proceedings of state courts.

This presents an important question not heretofore passed upon by this court. The decision of the state court is probably in conflict with the principles laid down by this court in holding that Congress can determine the scope and jurisdiction of the federal courts. *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180 and the holding in *Claflin* v. *Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Teste & Fleming* v. *Katt*, 330 U. S. 386, 91 L. Ed. 967; *Caldarola* v. *Eckert*, 332 U. S. 155, 158, 91 L. Ed. 1968, 1971 that powers and jurisdiction of the state courts is governed by the state constitution and statutes.

The decision of the state court is probably not in accord with Art. III, Sec. 1 of the Federal Constitution:

> "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

This court held in *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180 that Congress determines the scope and jurisdiction of the lower federal courts.

This court has never been heretofore called upon to determine this question as Congress has never before deprived citizens of the right of trial of common law actions by jury.

VIII.

Congress can not authorize the state courts to enter judgment for an amount in excess of the verdict of the jury.

The state court held that there was no error in the trial court entering judgment for damages and attorney's fees in excess of the verdict of the jury (R. 62, 70).

This decision is not in accord with applicable decision of this court. (Rule 38 (5) (a)).

In *Dimick* v. *Scheidt*, 293 U. S. 474, 482 91 L. Ed. 603 this court held:

> . . . both parties remain entitled . . . to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact."

This court reversed the above case because the court entered judgment for an amount in excess of the verdict of the jury.

This court has held that the award of exemplary damages has always been left to the jury.

Day v. *Woodworth*, 13 How. 363, 371, 14 L. Ed. 181.
Denver & Rio G. R. v. *Harris*, 122 U. S. 597, 609.

IX.

The Emergency Price Control Act of 1942, as amended, gave respondent no right to withhold possession of the premises after expiration of the lease, the end of petitioner's offer of the premises for rent.

Petitioner notified respondent that he would not offer the premises for rent after the expiration of the lease and was withdrawing the premises from the rental market (R. 20, 21).

Respondent withheld possession after the expiration of his lease for 232 days (R. 20). The state court held:

> "The Emergency Price Control Act and the regulations thereunder were designed and expressly intended to 'freeze' the occupancy of premises covered. The landlord here was in the company of thousands of others who had tenants who could lawfully occupy as long as they paid the rent" (R. 64).

This decision is in conflict with Sec. 4 (d) of the Act, 50 U.S.C.A. App. 904 (d), as decided by this court in *Bowles* v. *Willingham*, 321 U. S. 503, 517, 88 L. Ed. 892, 905 where this court said:

> "By S.4(d) of the act it provides 'nothing in this act shall be construed to require any person to sell any commodity or to offer any accommodations for rent'. There is no requirement that the apartments in question be used for purpose which bring them under the act."

X.

The act does not authorize a suit by respondent to recover money paid in the course of business for the purpose of making a profit by bringing this suit.

Respondent, a lawyer, made the payment six months after he surrendered possession of the premises for the

purpose of bringing this suit to collect treble the amount of the alleged overpayment and attorney's fees (R. 10, 26).

Judgment was entered for $3960.00 treble the alleged overpayment and $500 attorney's fees (R. 12). The State Supreme Court affirmed (R. 58, 70).

The act Sec. 205 (e) provides: (50 U.S.C.A. App. 925 (e))

> "If any person selling a commodity violates . . . a price schedule . . . the person who buys such commodity for use or consumption other than in the course of trade or business may . . . bring an action against the seller . . . For the purposes of this section the payment of rent . . . shall be deemed the buying or selling of a commodity . . . if the buyer either fails to institute an action under this subsection . . . or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States."

The payment made by respondent, a lawyer, to make a profit was in the course of business.

Business has been defined in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, 55 L. Ed. 389, as

> "Business is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dist. 158, citing *People ex rel. Hoyt* v. *Tax Comms.*, 23 N. Y. 242, 244: 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict., p. 273."

This being a payment made for profit was in the course of business and only the "Administrator" could bring suit "for the use of the United States" under the Act.

It is correctly said in the dissenting opinion:

> "Adequate means of enforcement are afforded to the administrator without the necessity of converting the provisions into an instrument of private aggrandizement" (R. 71).

In the following cases the courts of sister states have held that where a purchaser of a commodity in a retail store at over ceiling prices for the purpose of bringing suit under the Emergency Price Control Act could not recover.

Trapp v. *Great A. & P. Tea Co.*, 21 N. J. Misc. 205, 32 Atl. 2d 717.

Dunokin v. *S. W. Consumers Co.-op Ass'n*, 49 N. M. 69, 157 Pac. 2d 243.

This question of substance decided by the state court not theretofore determined by this court should be decided by this court.

XI.

The payment made by respondent six months after he surrendered possession of the premises was not made "in connection with the use or occupancy" of the premises and was not rent as defined in the act.

Respondent surrendered possession of the premises May 20, 1946 (R. 20) six months later on November 22, 1946 the payments of liquidated damages for withholding possession of the premises after the expiration of his lease was made (R. 20, 21).

Rent is defined in Sec. 302 (g) of the Act, (50 U.S.C.A. App. 942 (g)) as follows:

> "The term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations."

In the dissenting opinion in the State Supreme Court it is said:

> "At the time this payment was made the plaintiff (respondent) was neither in possession nor attempting to obtain possession. He voluntarily abandoned the

premises six months before. Under the circumstances the payment cannot, consistently with the purposes of the act, be brought within the ambiguous phrase 'in connection with' the use or occupancy of housing accommodations. It has no relation with the applicable statutory objective to 'protect persons with relatively fixed and limited incomes . . . from undue impairment of their standard of living'" (R. 71).

This presents a question of substance not theretofore determined by this court and should be decided by this court.

Conclusion.

For these reasons Petitioner urges that the Writ of Certiorari prayed in the Petition be granted.

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